

Statement of Chairman Greg Walden
Subcommittee on Communications and Technology
Hearing on FCC Process Reform
May 13, 2011
(Remarks Prepared for Delivery)

I welcome the FCC Chairman and commissioners to our hearing today and thank you for your thoughtful testimony and the time you each took to meet individually with me to discuss process reform ideas that could improve the transparency and accountability of the FCC. As I told the Chairman and each commissioner, and as Ms. Eshoo and I discussed and agreed yesterday, a discussion about reforming process is not, and should not become, an exercise in partisanship, or serve as a cloak to attack past or present commissions or chairmen.

As I'm sure all will notice, only four witness chairs are occupied in light of Commissioner Baker's announcement Wednesday. I'd like to thank her for her many years of public service, not only as a commissioner, but also in helping us complete the DTV transition while she was heading up the NTIA. I wish her well in her new endeavor.

Turning to today's topic, it is our responsibility to review how independent agencies to whom we have delegated authority and over which we have jurisdiction conduct the public's business. At times, the FCC succumbed to practices under both Democratic and Republican chairmen that weaken decision-making and jeopardize public confidence. While Chairman Genachowski and some of his predecessors have taken steps to improve process, we've all witnessed how process and procedures of one chairman can change dramatically under another. One FCC is open and transparent and the next is closed and dysfunctional. The time is ripe to codify best practices to ensure consistency from issue to issue, and commission to commission.

Many of my colleagues on this subcommittee have worked on reform ideas in the past, and some have proposed changes in bill form. We will consider those, as well. To kick things off, here are seven items to think about:

First, the FCC could be required to start new rulemaking proceedings with a notice of inquiry rather than a notice of proposed rulemaking. An NPRM presumes regulation is needed. The FCC should first examine the state of the relevant markets, services, and technologies. Even when regulation may be appropriate, the FCC is unlikely to craft as useful a proposal without first gathering preliminary information.

Second, the FCC does not always publish the text of proposed rules for public comment before adopting final rules. Providing specific text will allow for more constructive input and a better end product. Crafting proposed rules should not be difficult if there is a genuine need and the FCC has started with an NOI.

Third, finite timelines for resolution of matters would be helpful. Parties and the public should have some sense of when resolution will come.

Fourth, the FCC now makes information available about which draft items are circulating before the commissioners. The FCC could be required to provide additional information, such as a list of all unfinished items at the commission, the date the items were initiated, their current status, and expected date of completion.

Fifth, a bipartisan majority of commissioners other than the chairman could be allowed to initiate items to prevent a chairman from stopping consensus items.

Sixth, the President's Memorandum for the Heads of Executive Departments and Agencies, "Regulatory Flexibility, Small Business, and Job Creation" requires executive agencies to conduct cost-benefit analyses before adopting regulations. The memorandum does not apply, however, to independent agencies like the FCC. We could remedy that by requiring the FCC to identify actual consumer harm and conduct economic, market and cost-benefit analyses before adopting any regulation.

Seventh, the FCC's transaction review standards are vague and susceptible to abuse. Parties with a pending transaction should not feel pressure to accept "voluntary" conditions on the deal or to curtail their advocacy in other proceedings. These concerns are neither new nor of concern to only one party. Indeed, my good friend from Michigan, Chairman Emeritus Dingell, observed in a March 2000 hearing that there is "great need to address and to reform the way the FCC handles its merger reviews. These are a remarkable exercise in arrogance, and the behavior of the commission, oft-times by reason of delay and other matters, approaches what might well be defined as not just arrogance but extortion." The concerns Mr. Dingell raised then have been borne out with increasing frequency over the last decade. To address this, the FCC could be prohibited from adopting any conditions unless they are narrowly tailored to any transaction-specific harm. To prevent the FCC from using transactions to commence industry-wide changes it could not otherwise adopt, the FCC could be required to show statutory authority for the conditions outside the transaction review provisions of the Act.

These suggestions are simply meant as conversation starters. I look forward to additional suggestions from my colleagues or the commissioners themselves.